

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs July 9, 2002

WILLIAM STEVE GREENUP v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Obion County
No. 1-208 William B. Acree, Jr., Judge

No. W2001-01764-CCA-R3-PC - Filed October 2, 2002

The petitioner, William Steve Greenup, appeals the order of the Obion County Circuit Court dismissing his petition for post-conviction relief. The post-conviction court summarily dismissed the petition, finding the petition to be barred by the statute of limitations. On appeal, the petitioner contends that the post-conviction court erred in dismissing his petition as time-barred due to the recent United States Supreme Court rulings in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), and Glover v. United States, 531 U.S. 198, 121 S. Ct. 696 (2001), which he alleges created new rules of constitutional law requiring retroactive application to his case. After reviewing the record and the parties' briefs, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ALAN E. GLENN, JJ., joined.

William Steve Greenup, Ashland, Kentucky, Pro se.

Paul G. Summers, Attorney General and Reporter; P. Robin Dixon, Jr., Assistant Attorney General; Thomas A. Thomas, District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On December 16, 1987, the petitioner pled guilty to nine counts of obtaining over two hundred dollars (\$200) by false pretenses and received a total sentence of twelve years incarceration in the Tennessee Department of Correction. The petitioner is currently confined at a federal penitentiary in Kentucky. On or about June 26, 2001, nearly fourteen years after his guilty pleas, the petitioner mailed to the Circuit Court Clerk of Obion County a pro se petition for post-conviction

relief, which the clerk's office marked as filed on June 27, 2001.¹ In his petition, the petitioner asserted that his convictions must be set aside and vacated due to the recent Supreme Court decisions in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), and Glover v. United States, 531 U.S. 198, 121 S. Ct. 696 (2001). Specifically, the petitioner alleged that, because the monetary amount was an essential element of the offenses for which he was convicted, the amount should have been included in the indictment, presented to the trier of fact, and proven beyond a reasonable doubt. Additionally, the petitioner claimed that his counsel was ineffective for failing to object to the trial court's imposition of consecutive sentencing. The post-conviction court summarily dismissed the petition, holding that the petition was barred by the statute of limitations.² The petitioner appeals the dismissal of his petition for post-conviction relief.

II. Analysis

The petitioner's convictions became final on December 16, 1987. There is no dispute that the petitioner's June 2001 petition was filed outside the three-year statute of limitations period applicable to the petitioner's 1987 convictions. Tenn. Code Ann. § 40-30-102 (1986) (repealed 1995). However, the petitioner asserts that he is entitled to post-conviction relief under Tennessee Code Annotated section 40-30-202(b)(1) (1997), which creates an exception allowing a petition for post-conviction relief to be filed beyond the statute of limitations if the claim for relief is based upon a newly established constitutional rule of law, not existing at the time of trial, that requires retroactive application. Any such petition must be filed within one year of the court ruling establishing the new right. Tenn. Code Ann. § 40-30-202(b)(1).

In response to the petitioner's appeal, the State filed a motion asking this court to affirm the judgment of the post-conviction court pursuant to Rule 20, Rules of the Court of Criminal Appeals. In support of its Rule 20 motion, the State asserted that the post-conviction court properly dismissed the petition as time-barred. The State contended that, even if Apprendi did establish a new constitutional rule of law, the petitioner failed to file his petition within one year of the Apprendi decision as required by Tennessee Code Annotated section 40-30-202(b)(1). The State based its contention on the fact that the circuit court clerk's office marked the petition filed on June 27, 2001, more than one year after the Apprendi decision was handed down on June 26, 2000. However, in our order denying the State's Rule 20 motion, this court noted that, pursuant to Rule 49(c), Tennessee Rules of Criminal Procedure, and Rule 28, § 2(G), Rules of the Tennessee Supreme Court, the petition of a pro se litigant incarcerated in a correctional facility is deemed filed upon the prisoner's delivery of the petition to the appropriate prison authority, not upon the receipt of the petition by the court clerk. Because the petitioner signed the petition on June 22, 2001, and the

¹ The petitioner asserts that he did not file a direct appeal of his sentence and that this is his first petition for post-conviction relief.

² In its order dismissing the petition, the post-conviction court stated that the "[j]udgments of convictions were entered on December 16, 1987[,] in cases 6218 through 6313 for 95 counts of false pretense. The petition was filed on June 27, 1991. . . . The petition is barred by the statute of limitations." However, the petitioner was only convicted of nine of the ninety-five counts of false pretense, with eighty-six of the counts being dismissed, and the petitioner filed his petition in 2001, not 1991.

circuit court clerk's office filed the petition on June 27, 2001, this court logically concluded that the petitioner delivered the petition to the prison authorities for mailing on or before June 26, 2001, within the one year statute of limitations. Therefore, the petition will be considered timely if Apprendi and Glover established new constitutional rules of law that require retroactive application to the petitioner's case.

A. Apprendi

A "case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] . . . if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." Teague v. Lane, 489 U.S. 288, 301, 109 S. Ct. 1060, 1070 (1989) (citations omitted); see also Van Tran v. State, 66 S.W.3d 790, 810-11 (Tenn. 2001). Courts addressing whether Apprendi sets forth a new rule have held that, in Apprendi, "the Supreme Court announced a new constitutional rule of criminal procedure by holding that 'other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt.'" In re Clemmons, 259 F.3d 489, 491 (6th Cir. 2001) (quoting Apprendi, 530 U.S. at 491, 120 S. Ct. at 2362-63); see also United States v. Sanders, 247 F.3d 139, 147 (4th Cir. 2001) (holding that "Apprendi is certainly a new rule of criminal procedure"); United States v. Moss, 252 F.3d 993, 997 (8th Cir. 2001) (holding that "Apprendi is obviously a 'new rule'"). Because Apprendi sets forth a new constitutional rule of criminal procedure, the fundamental question becomes whether Apprendi applies retroactively to the petitioner's case.

New rules of constitutional criminal procedure are generally not applied retroactively on collateral review. Teague, 489 U.S. at 310. However, this general rule is subject to two exceptions. Id. "First, a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" Id. at 307. Second, a new rule should be applied retroactively if it is a "watershed rule of criminal procedure, . . . which implicates both the accuracy and fundamental fairness of criminal proceedings." Moss, 252 F.3d at 998 (citing Teague, 489 U.S. at 312). Clearly, the first exception is not applicable to the petitioner's claim, because the rule set forth in Apprendi "did not decriminalize any class of conduct or prohibit a certain category of punishment for a class of defendants." McCoy v. United States, 266 F.3d 1245, 1256 (11th Cir. 2001). Furthermore, the great weight of authority holds that Apprendi is not the type of watershed rule of criminal procedure that qualifies for retroactive application under the second exception. Dukes v. United States, 255 F.3d 912, 913 (8th Cir. 2001) (holding that "Apprendi presents a new rule of constitutional law that is not of 'watershed' magnitude and, consequently, petitioners may not raise Apprendi claims on collateral review"); Sanders, 247 F.3d at 151 (holding that "the new rule announced in Apprendi does not rise to the level of a watershed rule of criminal procedure which 'alters our understanding of the bedrock elements essential to the fairness of a proceeding'"); McCoy, 266 F.3d at 1257 (agreeing with the other circuits that "Apprendi is not sufficiently fundamental to fall within Teague's second exception"). Accordingly, we conclude that the new constitutional rule of criminal procedure announced in Apprendi does not apply retroactively on collateral review.

B. Glover

The petitioner also argues that the post-conviction court erred in dismissing his petition as time-barred because his petition was based, in part, on the new constitutional rule set forth in Glover v. United States, 531 U.S. 198, 121 S. Ct. 696 (2001). According to the petitioner, a defendant attempting to show prejudice in an ineffective assistance of counsel claim previously had to show “significant prejudice,” but, in Glover, the Supreme Court “made clear that ‘significant prejudice’ [was] no longer required.” Glover involved an ineffective assistance of counsel claim in which defense counsel’s failure to challenge the district court’s grouping of offenses led to a six to twenty-one month increase in the defendant’s sentence. Glover, 531 U.S. at 200-201. The lower courts found that an increase of six to twenty-one months in a defendant’s sentence was “not significant enough” to constitute prejudice under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Glover, 531 U.S. at 202. The Supreme Court reversed, holding that any increase in sentence due to counsel’s error was significant under the prejudice prong of Strickland. Id. at 203. The holding in Glover, however, does not state a new constitutional rule of law. As previously stated, “a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] . . . if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.” Teague, 489 U.S. at 301. The holding in Glover does neither. Instead, it clarifies the existing test for ineffective assistance of counsel under Strickland.

Because Appendi does not apply retroactively to cases on collateral review and Glover fails to establish a new constitutional rule of law, the petitioner’s post-conviction petition does not fall under the exception created in Tennessee Code Annotated section 40-30-202(b)(1). Therefore, the petition is barred by the statute of limitations.

III. Conclusion

For the foregoing reasons, we affirm the judgment of the post-conviction court.

NORMA McGEE OGLE, JUDGE